



Office of the Ohio Public Defender

Timothy Young, State Public Defender

TO: County Public Defenders, County Commissioners, Judges, County Auditors, Court Administrators, Ohio State Bar Association, Ohio Association of Criminal Defense Attorneys

FROM: Timothy Young, State Public Defender

DATE: November 4, 2019

SUBJECT: Indigent Defense Data and Budget

On July 24, 2019, the Ohio Public Defender Commission and the Office of the Ohio Public Defender (OPD) wrote to all indigent defense system stakeholders with the good news that Governor DeWine and the Ohio General Assembly (OGA) had increased the indigent defense reimbursement budget to an unprecedented level. The budget bill, House Bill (H.B.) 166, appropriated more than \$120 million in state Fiscal Year (FY) 2020 and \$155 million in FY 2021 for indigent defense reimbursement – more than doubling the budget for reimbursement from FY 2019. In that memo (https://opd.ohio.gov/Portals/0/Budget/Updates/July_Memo.pdf), the OPD gave an overview of Ohio's indigent defense system, encouraged counties to make necessary improvements to several specific areas of their respective systems, and indicated the OPD would be collecting further data and information and would be issuing guidance regarding the same. This memo provides further guidance regarding the indigent defense budget and the process whereby OPD will be collecting data for the Ohio Public Defender Commission's review.

DATA COLLECTION AND REVIEW

H.B. 166 requires the OPD to collect additional data from the counties and report to the OGA on various aspects of indigent defense reimbursement, including the total amount of money used by all of the counties for each of the following categories of costs: appointed counsel, expert witnesses, investigators, transcripts, travel, public defender, and personnel – as well as the cost for each of the following types of cases: felony, misdemeanor, traffic, and juvenile delinquency. To provide this county level data to the legislature, the OPD has amended the Appointed Counsel Monthly Report that each county submits, as well as the information required in the Public Defender Monthly Report. The revised monthly reports will ensure the OPD is able to provide the statutorily required data to the OGA. In an effort to facilitate county reporting of information in the monthly reports, the OPD has also amended the Appointed Counsel Fee Application Form and the Expert Expense Form. All of the revised forms are included in OPD's Standards and Guidelines, which have been updated to include this information, and are available on OPD's website on the reimbursement page: <https://opd.ohio.gov/Reimbursement/Reimbursement>.

Appointed Counsel Monthly Summary Report

The new appointed counsel monthly summary report will require counties to indicate the number of certificates (bills) they are submitting for reimbursement within each of the statutorily required categories, as well as total cost of all bills in each category. In an effort to aid counties in completing the revised monthly reports, specifically the cost of travel expenses submitted – the OPD has

made a minor amendment to the appointed counsel fee application, and has provided a line where travel expenses will be recorded separate from all other expenses. We have also updated our expert expense form to aid in tracking and reporting information. These changes were made to make the process of completing the monthly summary report more efficient.

Public Defender Monthly Summary Report

Adjustments have been made to the report to account for all statutorily required data, including recording the number of cases opened each month. For those 26 county public defender offices that are currently using OPD Online (OPD's free cloud-based case management application) OPD will provide guidance on how to generate a report from OPD Online with the required data.

In order to track where courts are granting extraordinary fees or are denying fees that are at or below the applicable county fee, the OPD has adjusted our Reimbursement Standards and Guidelines. For purposes of qualifying for reimbursement, the OPD will require a journal entry be attached to the fee application where a court has granted extraordinary fees or denied fees that are at or below the applicable county fee schedule. This requirement has also been codified in OAC 120-1-15 (effective November 7, 2019).

The OPD recognizes that implementation of these changes will likely require an adjustment to counties' reporting processes. Therefore, the OPD is providing a period of transition for all of the above changes. The amended appointed counsel monthly report forms and the amended public defender monthly report forms will be required beginning with reimbursement submissions in January 2020.¹

Appointed Counsel Fee Application Form

The main adjustment to this form is in the Summary of Charges, Hours, Expenses, and Billing Section. The section now line item totals on the first page of the form for travel expenses, all other expenses, counsel fees, and a grand total for the entire bill. This slight adjustment will aid counties in easily identifying travel expenses, which will now be required in the monthly report in order for the OPD to comply with RC 120.041.

Expert Expense Form

There are two adjustments to this form from the previous version. First, in order for the OPD to collect data on the type of expert expenses, a Type of Expense Section has been added. Second, requests for reimbursement of expert expenses is often an area in which counties have questions and encounter denials of reimbursement. One of the requisite factors for the OPD to reimburse an expert expense is that the expert must have been for defense purposes only. Meaning, the expert was used at defense counsel's discretion (e.g. whether to call the expert as a witness and enter their report into the record was at the discretion of defense counsel). The OPD has added an Attorney Affirmation for Court-Paid Expenses Section to the Expert Expense Form, which should significantly aid counties in their determination of appropriate expenses for reimbursement of expert expenses, and submission of the

¹ The OPD understands that processing indigent defense reimbursement requests in paper form is an antiquated method that is inefficient. The OPD is actively working to transition the indigent defense reimbursement process from the current paper form to a more efficient and effective electronic form. That electronic process will be a cloud-based application, OPD Reimbursement, that is currently in development and will be provided to all system parties free of charge by the OPD. OPD will be providing further information about this application in 2020, with deployment projected for 2021.



same. The OPD has also added additional guidance and examples to our Reimbursement Standards and Guidelines in this area – the objective being to help support counties in making appropriate requests for expert expenses.

Fee Schedules

As indicated in the July memo, as part of the Ohio Public Defender Commission's duties to oversee the meaningful delivery of indigent defense services in Ohio, the OPD would review all counties' hourly rates, fee schedules, caseloads, and pay parity. For the Ohio Public Defender Commission to review the fee schedules of each of the respective counties, the OPD is asking that each county submit a copy of their current fee schedule to the OPD by January 31, 2020. Counties may email a copy of those fee schedules to outreach@opd.ohio.gov (preferred method) or mail a copy to the OPD. The OPD encourages each county to review their fee schedule in consultation with their local bar association and adjust hourly rates and caps to ensure fees are adequate to provide effective representation.

INDIGENT DEFENSE BUDGET

It has been reported by multiple counties that the County Commissioners Association of Ohio (CCAO) is indicating there are not sufficient funds for the OPD to provide higher rates of reimbursement. This is not only incorrect but it is potentially harmful to some counties. The OPD is confident there are sufficient funds to support higher rates of reimbursement in FY2020 and FY2021. The OPD met with the CCAO months ago addressing these concerns and most recently sent a letter to the CCAO asking for their partnership in ensuring county commissioners and other stakeholders receive accurate information regarding the indigent defense budget (<https://opd.ohio.gov/Portals/0/Budget/Updates/CCAO.pdf>).

In FY 2019, the OGA appropriated approximately \$60 million dollars to the OPD for reimbursement of county indigent defense costs. The cumulative total of statewide indigent defense reimbursement submissions was approximately \$143 million dollars – which resulted in OPD being able to pay for 42% of the system costs through reimbursement. The OGA has appropriated \$120 million to OPD for indigent defense reimbursement in FY2020. The OPD has projected a 70% reimbursement rate based on that appropriation – which would allow for \$170 million dollars in total statewide reimbursement submissions. Thus, in projecting a 70% reimbursement rate, OPD has taken into account not only the present system costs, but also inflationary costs and necessary improvement costs in that calculation – including approximately \$27 million dollars in increased expenses related to system improvements. Similarly, the OGA appropriated \$155 million to OPD for reimbursement in FY 2021. The OPD has tentatively projected a 90% reimbursement rate, and again, has taken into account present system costs, inflationary costs, and necessary system improvements. The OPD will be better able to forecast the specific reimbursement rate for FY2021 once we have received data from the FY 2020 reimbursement submissions. The OPD is confident that the indigent defense reimbursement budget for FY 2020 and FY 2021 allows counties to make improvements across both years of the biennium, spend fewer local dollars, and receive increased reimbursement.

The Governor and the OGA purposely put the additional funds into indigent defense funding. Had this money been intended solely as an increase to local government funds, the money could have been put in a line just for that purpose. That did not occur. The money was put into indigent defense to serve dual purposes: one, to allow counties to meet constitutional and statutory standards for indigent defense and; two, to assist counties with local government funding. It was not intended to be a binary



choice of one or the other. And as can be seen, using the OPD's calculations above, the majority of the funding will still be available for counties to use to increase local government funding.

The increase in funding to indigent defense reimbursement did not transfer control and responsibility for indigent defense to the State. Each county still maintains and controls decisions regarding its indigent defense system – including the selection of the delivery model, the budget, and the overall structure. It remains each county's duty to set a budget and fund a system that meets constitutional and statutory standards.

The messaging to not use this increased funding to make necessary improvements to indigent defense services could cause harm to many counties. As you are aware, since the inception of the indigent defense system in 1976, in order to qualify for reimbursement, the local decisions on indigent defense must meet the standards required by Ohio Administrative Code Chapter 120 and Ohio Revised Code Chapter 120. Failing to make improvements that meet these standards, and are essential to effective representation, places a county at risk for reduced reimbursement and/or constitutional challenges from defendants or classes of defendants. Just one example of this risk is there are nine counties that have fee schedules that have not been amended since the 1980s (in full or in part).

Because the State did not pass an unfunded mandate but actually funded it, counties can improve their indigent defense services, meet the obligations to provide effective defense services, pay less in local dollars, and receive increases in the funds returning to their counties. The right to counsel is a fundamental and highly cherished right in this nation. Choosing not to make necessary improvements to shore up this right when the means have been made available erodes the basic foundations of an adversarial justice system.

CONCLUSION

The OPD appreciates your time and attention to ensuring Ohio's indigent defense system meets the standards and guidelines established for reimbursement, and your commitment to offering quality indigent defense throughout the state of Ohio. Should you have any questions, wish to speak with the OPD further, or require assistance in regard to any of the above topics, please do not hesitate to contact the Office of the Ohio Public Defender's Policy & Outreach Division, by calling 614.466.5394, or emailing outreach@opd.ohio.gov.

